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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RANDON BRAGDON, D.M.D.,
Petitioner,
v.
SIDNEY ABBOTT, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF REVERSAL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF REVERSAL

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*.[1] Letters of consent from all parties have been filed with the Clerk of the Court. The brief urges this Court to reverse the decision below, and thus supports the position of Petitioner Randon Bragdon, D.M.D., before this Court.

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[1] Counsel for EEAC authored the brief in its entirety. No person or entity, other than EEAC, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117 (Title I). All of EEAC's members own commercial facilities subject to Title III of the ADA, 42 U.S.C. §§ 12181-12189 (Title III), and many own, operate, lease, or lease to places of public accommodation, also subject to Title III.

Moreover, most of EEAC's members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities. Also, some of EEAC's members are the recipients of federal financial assistance and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 share a common definition of "disability," which establishes the parameters of the protected class under each statute. Both statutes define "disability" in terms of an impairment that "substantially limits a major life activity." Thus, EEAC members have a direct interest in the issues presented in this case; *i.e.*, whether "reproduction" is a major life activity under the ADA, so that a person who is "substantially limited" in "reproduction" is an "individual with a disability" protected by the ADA; and whether an impairment can be a disability *per se* and not subject to case-by-case analysis.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in numerous cases before this Court, the United States Courts of Appeals, and various state supreme courts. As part of this activity, EEAC participated as *amicus curiae* in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), and other cases in this Court construing the Rehabilitation Act of 1973. *E.g.*, *Alexander v. Choate*, 469 U.S. 287 (1985), *CONRAIL v. Darrone*, 465 U.S. 624 (1984); *University of Texas v. Camenisch*, 451 U.S. 390 (1981); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In addition, EEAC has participated in several cases in the courts of appeals regarding the proper interpretation of the ADA's definition of "disability," *e.g.*, *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996) (holding that "reproduction" is not a major life activity); and other issues. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns involved in this case.

EEAC seeks to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the

Court relevant matter that has not already been brought to its attention by the parties. Because of its experience in these matters, EEAC is well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner Randon Bragdon, D.M.D., is a dentist in Bangor, Maine. *Abbott v. Bragdon*, 107 F.3d 934, 937 (1st Cir. 1997). Respondent Sidney Abbott visited Dr. Bragdon's office on September 16, 1994 for a dental appointment. *Id.* She informed Dr. Bragdon's office that she had the HIV virus. *Id.* Dr. Bragdon examined Ms. Abbott, and found a cavity. *Id.* He then told her that he would not fill the cavity in his office, but would do so in a hospital. *Id.* While he would charge her his usual fee, Ms. Abbott would be responsible for hospital costs. *Id.* Ms. Abbott declincd, and filed a complaint against Dr. Bragdon under the Americans with Disabilities Act. *Id.* at 937-38.

The district court granted summary judgment for Ms. Abbott. *Abbott v. Bragdon*, 912 F. Supp. 580 (D. Me. 1995). The district court concluded that "reproduction" is a major life activity under the ADA, *id.* at 586, and that Ms. Abbott, who, although HIV-positive, was asymptomatic, was substantially limited in reproduction and therefore was an "individual with a disability" and a member of the protected class under the ADA. *Id.* at 586-87. Further, the lower court ruled, if Dr. Bragdon were to use the precautions recommended by the Center for Disease Control, treating an HIV-positive patient in his dental office would not pose a "direct threat" to the health and

safety of others. *Id.* at 591. Accordingly, the district court concluded, Dr. Bragdon had violated Title III of the ADA by refusing to treat Ms. Abbott in his office. *Id.* at 595. The U.S. Court of Appeals for the First Circuit affirmed, ruling, *inter alia*, that "HIV-positive status is a physical impairment that substantially limits a fecund woman's major life activity of reproduction." 107 F.3d at 942. This Court granted Dr. Bragdon's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The statutory definition of "disability" establishes the scope of the class protected under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* To make out a *prima facie* case under the ADA, a potential plaintiff must be able to show that he or she has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. 42 U.S.C. § 12102(2).

Accordingly, the meaning of the statutory term "major life activity" is of significant importance in determining the parameters of the protected class. Regulations developed under the Rehabilitation Act of 1973, from which the statutory definition was drawn, define "major life activity" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *E.g.*, 45 C.F.R. § 84.3(j)(2)(i). This list was adopted verbatim into regulations interpreting the ADA. 28 C.F.R. § 36.104 (Title III); 29 C.F.R. § 1630.2(i) (Title I).

"Reproduction" is incongruous with the listed activities. First, the listed activities share common char-

acteristics of frequency and duration that "reproduction" lacks. Second, the listed activities each describe a discrete function, while "reproduction" is an extremely broad term that describes the culmination of numerous different activities, an impairment of any one of which could preclude an individual from bringing forth offspring. Third, reproduction involves significant elements of personal choice that, as a practical matter, are not associated with the listed activities. For these reasons, "reproduction" is not properly viewed as a "major life activity conferring ADA coverage." *Krauel v. Iowa Methodist Medical Ctr.*, 95 F.3d 674 (8th Cir. 1996).

Many physical and mental impairments have the potential for severe and devastating consequences. For this reason, it may be tempting to declare such impairments as disabilities *per se* under the ADA. The statutory language, however, precludes such a result. As drafted, the statutory definition of "disability" requires an individualized assessment as to the degree of limitation an impairment imposes on an individual's major life activities. *Ennis v. National Ass'n of Business & Educ. Radio*, 53 F.3d 55 (4th Cir. 1995). Accordingly, the court below erred in treating Abbott's asymptomatic HIV-positive condition as a *per se* disability under the ADA.

ARGUMENT

I. "REPRODUCTION" DOES NOT CONSTITUTE A MAJOR LIFE ACTIVITY WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT

A. The ADA's Definition of Disability, Which Establishes the Scope of the Protected Class, Addresses only Impairments of *Major* Life Activities

Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (ADA) proscribes discrimination against an "individual . . . on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182. Similarly, Title I of the ADA prohibits discrimination in employment against a "qualified individual with a disability" because of a disability. 42 U.S.C. § 12112(a).

The threshold requirement for coverage under the ADA is that the plaintiff be an "individual with a disability" as that term is defined in the law.[2] For

[2] Both Titles also prohibit discrimination against an individual "because of the known disability of an indivdual with whom the individual or entity is known to have a relationship or association." 42 U.S.C. § 12182(b)(1)(D) (Title III). *See also* 42 U.S.C. § 12112(b)(4). Thus, although the ADA will protect nondisabled individuals in this instance, this protection still flows from the existence of a disability. Moreover, the ADA generally prohibits retaliation, coercion, intimidation, threats, or interference against any individual who opposes acts that are unlawful under the ADA, who participates in a proceeding under the ADA, who exercises rights granted by the ADA, or who aids or encourages another in doing so. 42 U.S.C. § 12203. Again, however, protection is linked inextricably to disability.

this reason, establishing the existence of a disability is the first element of the plaintiff's burden of proof in an ADA case in every circuit. *E.g., Soileau v. Guildford of Maine*, 105 F.3d 12, 14-15 (1st Cir. 1997); *Wernick v. FRB*, 91 F.3d 379, 383 (2d Cir. 1996); *Lawrence v. National Westminster Bank*, 98 F.3d 61, 68 (3d Cir. 1996); *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 212 (4th Cir. 1994); *Rogers v. International Marine Terminals*, 87 F.3d 755, 758 (5th Cir. 1996); *McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 371 (6th Cir. 1997); *DeLuca v. Winer Industries*, 53 F.3d 793, 797 (7th Cir. 1995); *Benson v. Northwest Airlines*, 62 F.3d 1108, 1112 (8th Cir. 1995); *Sanders v. Arneson Prods.*, 91 F.3d 1351, 1353 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995); *Gordon v. E.L. Hamm & Associates*, 100 F.3d 907, 910 (11th Cir. 1996), *cert. denied*, 66 U.S. L.W. 3416 (1997).

Thus, the statutory definition of "disability" establishes the scope of the protected class. The ADA defines "disability" as follows:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Where the plaintiff in an ADA case is not an "individual with a disability," summary judgment is appropriate. *E.g., Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995).

B. Reproduction Is Not Congruous With The List of Major Life Activities Commonly Identified in Connection With ADA Coverage

1. *An Identified List of "Major Life Activities," Rooted in the Rehabilitation Act, Is Associated with the ADA's Definition of Disability*

Neither the ADA nor its predecessor, the Rehabilitation Act of 1973,[3] explains any of the terms used in the definition, such as "physical or mental impairment," "substantially limits," or "major life activity." Both the U.S. Department of Justice, which has jurisdiction over Title III, and the Equal Employment Opportunity Commission, which has jurisdiction over Title I, have issued interpretive regulations that *inter alia*, offer definitions for significant statutory terms. 28 C.F.R. Part 34 (DOJ); 29 C.F.R. Part 1630 (EEOC). Each agency used as its source regulations interpreting Section 504 of the Rehabilitation Act. The Department of Justice relied on regulations of the Department of Health, Education and Welfare, 42 Fed. Reg. 22685 (1977) (codified at 45 C.F.R. Part 84). 56 Fed. Reg. 35543, 35548 (1991). The EEOC used regulations issued by the Department of Education at 34 C.F.R. Part 104. 29 C.F.R. § 1630.2 (h) (Appendix).

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[3] The ADA definition of "disability" mirrors the definition of "handicapped individual" in the Rehabilitation Act of 1973, 29 U.S.C. § 706, and the ADA's legislative history confirms the Rehabilitation Act as the source of the ADA definition. S. Rep. No. 101-116, at 21 (1989); H.R. Rep. No. 101-485, pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 332; H.R. Rep. No. 101-485, pt. 3, at 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 450.

Both DOJ and the EEOC state that "the phrase 'major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 36.104; 29 C.F.R. § 1630.2(i).[4] While the list is explicitly nonexclusive, preceded as it is by the phrase "such as," this does not make the list entirely open-ended. On the contrary, the Court must use some discretion in deciding what other functions properly may be added to the list. Every addition broadens the scope of the ADA's protected class, creating the potential for innumerable additional claims. Thus, additions to the list, if any, should be made only after careful consideration as to whether they truly belong there.

The court below added "reproduction" to the list. *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997). As the Eighth Circuit concluded in *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996), however, "reproduction" is not properly viewed as a "major life activity" conferring ADA coverage. For

[4] Both agencies define "physical or mental" impairment as:

> (i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or
>
> (ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 36.104, 29 C.F.R. § 1630.2(h). According to both agencies, the definition was drawn from regulations interpreting the Rehabilitation Act. 56 Fed. Reg. 35543, 35548 (1991) (DOJ); 29 C.F.R. § 1630.2(h) (Appendix) (EEOC).

this reason, this Court should reverse the decision below.

2. *Unlike Reproduction, the Listed Activities Share Common Characteristics of Frequency and Duration*

The established list of major life activities has symmetry, in that the activities on the list are those which people do virtually on a daily basis for their entire lives. Living beings breathe constantly, and see and hear during waking hours. They walk, speak, care for themselves, and perform manual tasks many times a day, all their lives. Even those not actively engaged in study learn many small things each day.

"Reproduction" is distinguishable just on this basis:

> [F]inding "reproduction" to be a "major life activity" would be inconsistent with the illustrative list of major life activities provided in the ADA regulations. Reproduction is not an activity engaged in with the same degree of frequency as the listed activities of walking, seeing, speaking, breathing, learning, and working. A person is required to walk, see, learn, speak, breathe, and work throughout the day, day in and day out. However, a person is not called upon to reproduce throughout the day, every day. This Court cannot reasonably infer that reproduction is a "major life activity" based on an analysis of the illustrative list of activities in the regulation.

Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240 (E.D. La. 1995), *aff'd without opinion*, 79 F.3d 1143 (5th Cir. 1996). *Accord Farmer v. National City Corp.*, No. C-2-04-966, 1996 U.S. Dist. LEXIS 20941, at *7-*8 (S.D. Ohio April 4, 1996).

Citing *Zatarain*, the Eighth Circuit likewise has concluded that "reproduction" does not belong in the list of "major life activities" under the ADA. *Krauel v. Iowa Methodist Medical Ctr.*, 95 F.3d 674 (8th Cir. 1996). Krauel sought coverage for her fertility treatments through her employer-provided health insurance coverage, and sued her employer under the ADA when the coverage was denied. Krauel claimed ADA protection based on her contention that she was substantially limited in "reproduction" and "caring for others" because her infertility prevented her from conceiving naturally. Concluding that Krauel was not a member of the protected class, the Eighth Circuit stated:

> While we recognize that this list is non-exclusive, we note that reproduction and caring for others are not among the examples of listed activities. Although Krauel is unable to conceive without medical intervention, she has the ability to care for herself, perform manual tasks, walk, see, hear, speak, breathe, learn, and work. . . We conclude, then, that to treat reproduction and caring for others as major life activities under the ADA would be inconsistent with the illustrative list of activities in the regulations, and a considerable stretch of federal law.

95 F.3d at 677.

The Eighth Circuit is correct. What the listed activities have in common—and "reproduction" does not—is that they are activities that everyone performs on a daily basis throughout their lives, and the inability to perform them makes day-to-day life more difficult. While individuals with disabilities routinely function effectively as productive members of society, there is no question that, on a daily basis, the inability

to see, or to hear, or to walk, or to speak makes it more difficult to do so.

"Reproduction" falls far short of this level. An individual who is unable to reproduce—but has no disability—goes about his or her day-to-day living unimpeded, able to get up, get dressed, eat breakfast, and go to school or to work without assistance.

3. *Unlike Reproduction, the Listed Activities Describe Discrete Functions*

Unlike "reproduction," the items listed as examples of major life activities describe particular, discernible functions. Walking, seeing, hearing, speaking, breathing, learning, and working all describe a single, recognizable act. Similarly, "caring for oneself" and "performing manual tasks" at most describe a category of similar functions with a commonality of purpose or execution.

Reproduction, on the other hand, is a broad term that encompasses a wide variety of functions. Reproduction incorporates the ability to have sexual intercourse, the ability to impregnate or to conceive, the ability to carry a child to term, and the ability to give birth to a viable infant. Indeed, the district court below also read "reproduction" to include "the process of raising and caring for offspring." *Bragdon*, 912 F. Supp. at 586.

Under an interpretation that "reproduction" in and of itself is a major life activity, a substantial limitation to any one of these activities would confer ADA coverage, regardless of whether or not any other functions were limited. Every prepubescent and every post-menopausal female, every impotent male, every person who has undergone a surgical procedure to

prevent conception, would become an "individual with a disability" who is a member of the protected class under the ADA.

This makes no sense, particularly since modern science has overcome many of the barriers to reproduction that previously existed. For those who have difficulty conceiving, there are fertility drugs. For those who are sterile, in vitro fertilization or surrogate paenthood may be viable options. Adoption has met the needs of many people whose goal is to raise a child.

4. *Reproduction Involves Significant Elements of Personal Choice Generally Absent From the Listed Activities*

As a practical matter, "reproduction" embodies an element of personal choice that customarily is not associated with the listed activities. Few of those who are able to care for themselves, perform manual tasks, walk, see, hear, speak, breathe, learn, and work will simply elect not to do so. In contrast, people regularly make choices about each of the individual functions involved in reproduction, and for a variety of reasons. People choose, for example, not to have sexual intercourse with a member of the opposite sex, for moral reasons, as a lifestyle choice, or for a myriad of other reasons. People who do engage in sexual intercourse with a member of the opposite sex still may use birth control methods—including quasi-permanent surgical intervention, medication, and a variety of temporary devices—to prevent conception because they do not want to have a child. Perhaps they never want children; perhaps they do not choose to have a child now. Again, the reasons are legion—lifestyle choice, financial ability, the choice not to have

a child outside of wedlock, or the fear of passing a genetic defect or infectious disease. Similarly, women who become pregnant sometimes choose not to carry the child to term, and elect abortion instead, again for similar reasons. Finally, even a woman who carries a child to term may decide not to raise that child herself, but may delegate that duty to a relative or friend, or give the child up for foster care or adoption.

5. *Contrary Authority Is Not Well-Reasoned*

The cases decided in the Northern District of Illinois, *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994), and *Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995), holding that "reproduction" is a major life activity under the ADA, are representative of the authority to the contrary and are wrongly decided for several reasons. First, they rely at least in part on the Seventh Circuit's decision in *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992). In *McWright*, however, the employer did not dispute the plaintiff's contention that her infertility was a disability, perhaps because the infertility was a result of childhood polio which left the plaintiff with several other impairments as well.

Second, while recognizing that the issue of whether "reproduction" was a major life activity was not in dispute in *McWright*, the courts in *Pacourek* and *Erickson* nevertheless found persuasive dicta in *McWright* that "[t]he regulations define the protected class of handicapped individuals to include any person with a physiological disorder affecting the reproductive system." *McWright*, 982 F.2d at 395 (quoted in *Erickson*, 911 F. Supp. at 322, and cited in *Pacou-*

rek, 858 F. Supp. at 1404). Reliance on this language is misplaced as well. As a primary matter, it is incorrect. The regulations cited in *McWright*, 29 C.F.R. § 1613.702(b)(1), define *impairment* to include physiological disorders affecting the reproductive system. As noted above, not every impairment confers protected class status; only those that *substantially limit a major life activity*. Moreover, the fact that the regulations include disorders of the reproductive system as impairments does not lead inexorably to the conclusion that reproduction is a major life activity. "As the court in *Zatarain* observed, this argument is flawed because 'physical or mental impairment' and 'major life activities' are 'separate and distinct' components of the ADA's definition of disability." *Krauel*, 95 F.3d at 677 (quoting *Zatarain*, 881 F. Supp. at 243).

It is true that one congressional committee reporting out a version of the ADA commented that "a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships." H.R. Rep. No. 101-485, pt. 2, at 52 (1990). No further explanation is offered, however. Nor does the Committee explain why, in the previous paragraph, it listed examples of "major life activities" without once mentioning either procreation or intimate sexual relationships. *Id.*

Likewise, the reference by the court below to conception and raising children as "basic civil rights" (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) misses the point. A plurality of the Fourth Circuit has observed that:

> [t]he constitutionally protected status of an activity . . . has little, if any, bearing on whether or not an activity is one of the major life activities contemplated by the ADA. Neither gathering in a group nor carrying a firearm are one of the major life activities under the ADA, though individuals have the constitutional right to peaceably assemble, *see* U.S. Const. Amend. I; and to "keep and bear Arms," U.S. Const. amend. II.

Runnebaum v. NationsBank of Maryland, N.A., 123 F.3d 156, 170 n.8 (4th Cir. 1997).

Expanding the existing list of "major life activities" to include "reproduction" would have an impact well beyond the scope of this case, and indeed, beyond Title III of the ADA. If "reproduction" were recognized as a "major life activity," then *any* physical or mental impairment that substantially limits any of the functions arguably part of "reproduction" would confer protected class status. Such a result would expand exponentially not only the number of individuals covered by the ADA, but also the obligation of employers to make "reasonable accommodation" for those "disabilities."

Accordingly, this Court should conclude that "reproduction" is not a major life activity under the ADA and reverse the decision below.

II. THERE ARE NO *PER SE* DISABILITIES WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT

The statutory definition of "disability," which circumscribes the protected class under the Americans with Disabilities Act, is a threshold provision that all potential plaintiffs must meet. Each alleged victim of disability-based discrimination must demonstrate,

at the outset, that he or she has "a physical or mental impairment that substantially limits a major life activity," has a "record" of an impairment that substantially limits a major life activity, or has been "regarded as" having an impairment that substantially limits a major life activity. No lesser proof will do.

The statute by its terms, therefore, precludes the possibility that *any* impairment, however severe, can be a disability *per se*.

> [T]he plain language of the provision requires that a finding of disability be made on an individual-[b]y-individual basis. The term "disability" is specifically defined, for each of subparts (A), (B), and (C), "with respect to the individual," and the individualized focus is reinforced by the requirement that the underlying impairment substantially limit a major life activity *of the individual*.
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> * * * *
>
> Were we to hold that A.J. was disabled under the ADA, therefore, we would have to conclude that HIV-positive status is *per se* a disability. The plain language of the statute, which contemplates case-by-case determinations of whether a given impairment substantially limits a major life activity, whether an individual has a record of such a substantially limiting impairment, or whether an individual is being perceived as having such a substantially limiting impairment, simply would not permit this a [sic] conclusion.

Ennis v. National Ass'n of Business & Educ. Radio, 53 F.3d 55, 60 (4th Cir. 1995) (emphasis in original) (citations omitted).

To its definition of "physical or mental impairment" in its regulations interpreting Title III of the ADA, the Department of Justice added:

> (iii) The phrase physical or mental impairment includes, but is not limited to, such *contagious and noncontagious* diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, *HIV disease (whether symptomatic or asymptomatic), tuberculosis*, drug addiction, and alcoholism.

28 C.F.R. § 36.104 (emphasis added). The regulation itself is not problematic, since it merely identifies conditions that are "impairments," not necessarily "disabilities." The Department's explanation, however, goes well beyond this point, concluding that HIV is a disability *per se*:

> The examples of "physical or mental impairments in paragraph 1(iii) are the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease (symptomatic or asymptomatic)" and "tuberculosis" to the list of examples. These additions are based on the ADA committee reports, case law, and official legal opinions interpreting section 504. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the *Arline* decision, this Department's Office of Legal Coun-

> sel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease, or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled.

56 Fed. Reg. 35543, 35548 (July 26, 1991) (citation omitted).

In so doing, the Department seriously misconstrued this Court's opinion in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). Contrary to the Department's interpretation, this Court in *Arline* did *not* hold that individuals with contagious diseases were automatically *covered* by Section 504. Instead, the Court ruled in *Arline* that an individual is not *excluded* from statutory protection merely because the individual has a contagious disease. "We conclude that the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504." *Arline*, 480 U.S. at 285-86. Indeed, the Court stated explicitly that the issue of whether contagiousness alone would confer coverage was *not* being addressed.

> This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

480 U.S. at 282 n.7.

In explanatory material accompanying its regulations interpreting Title I, the EEOC explains in detail the need for an individualized determination of whether or not an impairment substantially limits a major life activity:

> Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.
>
> The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

29 C.F.R. § 1630.2(j) (Appendix). Inexplicably, then, and without any explanation, the agency then states that "other impairments, however, such as HIV infection, are inherently substantially limiting." *Id.*

The agency's main point—that whether or not a person is an "individual with a disability" depends upon the effect of an impairment on that indivdual's major life activities—is more consistent with the statutory language.

This Court's decision in *Arline* exemplifies the case-by-case analysis that is appropriate under the Rehabilitation Act as well as the ADA. *Arline* involved a teacher who was terminated because her tuberculosis, which had been in remission for twenty years, recurred three times in two years, and the school board feared contagion. 480 U.S. at 276. As noted above, this Court's holding in *Arline* was that a person who meets the statutory definition of an individual with a disability is not disqualified from the protected class merely because the disability poses a threat of contagion.

As part of its reasoning in *Arline*, however, this Court carefully considered the statutory definition before determining that Arline indeed was a member of the protected class. The Court first determined that Arline had had a physical impairment under the regulatory definition, since according to medical testimony, Arline's tuberculosis was severe enough in 1957 to affect her respiratory system. Since the condition was "serious enough to require hospitalization" at the time, the Court concluded that Arline's major life activities had been limited at the time. For this reason, the Court ruled, Arline had a "record" of a disability that placed her within the protected class. 480 U.S. at 281.

The statutory definition of "disability" mandates an individualized inquiry whether a physical or mental impairment substantially limits the particular individual in one or more major life activities. To declare, by judicial fiat, that one impairment or another is *per se* a disability undermines this important concept. Accordingly, this Court should conclude that there are no "*per se*" disabilities under the ADA.

CONCLUSION

For the foregoing reasons, *amicus* Equal Employment Advisory Council respectfully submits that the decision below should be reversed.

Respectfully submitted,

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